Anchor Inns, Inc. d/b/a Anchor Inn Hotel of St. Croix and Gastronomical Workers Union of Puerto Rico, Local 610, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. Case 24-CA-4250

July 21, 1982

#### **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

On March 4, 1982, Administrative Law Judge Almira Abbott Stevenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed a response to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt her recommended Order.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety; that the certification issued in Case 24-RC-6207 be revoked; and that Case 24-RC-6207 be severed and remanded to the Regional Director for Region 24 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

### **DECISION**

#### STATEMENT OF THE CASE

ALMIRA ABBOT STEVENSON, Administrative Law Judge: This matter was heard October 24, 1981, at Christiansted, St. Croix, U.S. Virgin Islands, on the National Labor Relations Board's Order remanding the proceed-

ing to the Regional Director for hearing dated July 14, 1981

On July 18, 1980, the Board issued its Decision and Order<sup>1</sup> in this case finding that Respondent had engaged in and was engaging in unfair labor practices within Section 8(a)(5) and (1) of the National Labor Relations Act by refusing, on and after July 10, 1979, to bargain with the Union. The Union was certified on May 8, 1979, following an election conducted by the Board on December 15, 1978, in a unit of six service and maintenance employees employed at Respondent's St. Croix facility in Case 24-RC-6207.2 The Board, among other things, found no merit in the Respondent's contention, in support of its objection to the election, that the election should be set aside because an agent of the Union threatened employees with loss of their jobs if they did not vote for the Union, or that a hearing should be held on the objection; the Board also affirmed its denial of a motion for reconsideration filed by Respondent in Case 24-RC-6207 on grounds of insufficient showing that the evidence of alleged additional misconduct proffered in support of the motion was previously unavailable or that, if considered, it would require a different result. Thereafter on March 20, 1981, the United States Court of Appeals for the Third Circuit denied enforcement of the Board's Order and remanded the case to the Board for a hearing on Respondent's motion for reconsideration and reevaluation of the objection if the validity of the election were upheld after hearing on the motion for reconsideration. In its order remanding the proceeding to the Regional Director for hearing, the Board directed that the hearing encompass the issues raised in both the motion and the objection.

The issues are whether or not (1) maintenance man Hippolyte Victor was an agent of the Union; (2) he threatened employees if they did not vote for the Union; and (3) Victor's conduct interfered with the election.

Upon the entire record and my observation of the demeanor of the witnesses, and upon due consideration of the briefs filed by Respondent and the General Counsel, I make the following:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. HIPPOLYTE VICTOR'S ALLEGED AGENCY STATUS

Respondent asserts, and the General Counsel denies, that Hippolyte Victor was an agent of the Union or was invested with the apparent authority of a union agent to the extent that his conduct was attributable to the Union.

Victor was the maintenance man at the Inn until he was terminated by Proprietor Lon Southerland 9 months after the election, in September 1979, on suspicion of vandalizing the swimming pool. He did not appear or testify at the hearing. There is no direct evidence that he

<sup>&</sup>lt;sup>1</sup> The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

<sup>1 250</sup> NLRB 767.

<sup>&</sup>lt;sup>2</sup> The vote was four for and one against the Union, with one challenge which was not resolved. Names of the unit employees were Albert Hughes, Catherine Wade, Hermie Joseph, Lucille Daley, and Beatrice Duncan. Hippolyte Victor was challenged by the Employer as a supervisor, but no evidence has been presented that he was a supervisor was not determinative of the outcome of the election.

was an agent of the Union, or that the Union was aware of his conduct described below.

During the organizational campaign Victor advocated election of the Union, and he told the employees in the unit that Union Special Organizer Ralph Mandrew chose him as the Union's representative at the Inn. None of the employees asked Mandrew whether this was true or not and Mandrew never told any of them that Victor was the union representative, but all the employees informed proprietor Southerland at one time or another that Victor was the union representative.

Because of the small size of this unit, Mandrew did not form an employee committee but instead did the organizing himself. It was Catherine Wade who made the initial contact with Mandrew about bringing union representation to the employees of the Inn and it was to her that he gave union authorization cards for distribution among the employees and delegated the task of arranging the first meeting with the employees on October 2, 1978. Wade had been talked into making the contact with Mandrew by Victor and a nonunit front-desk employee, but there is no evidence that this was known by Mandrew. Wade brought two signed authorization cards to Mandrew, her own and that of one other employee; Victor brought only his own card, as did two other employees in the unit. Mandrew first heard of Victor at the October 2 meeting, when other employees informed him Victor was on vacation; he first saw Victor when he came to the union office on October 10 and signed a card. Mandrew alone represented the Union at the preelection conference held at the Board's Regional Office on November 13; no employee accompanied him. At an employee meeting at the union office on December 6, which Catherine Wade did not attend, the unit employees by consensus, and not Mandrew, designated Victor to be the union observer at the polls. Mandrew gave Victor nothing in writing and paid him no money either during or after the campaign, and none of the employees reported to Mandrew that Victor had threatened them.3

This evidence fails to establish that Victor was ever designated by the Union to represent it in any capacity. The organizing for the Union was done entirely by its special organizer, Ralph Mandrew, whose office was located in the same small city, Christiansted, St. Croix, U.S. Virgin Island, at the Anchor Inn where these employees worked. Mandrew appointed no inplant organizing committee, and took none of the employees to the

preelection conference at the NLRB Regional Office. Mandrew was known to the employees and all save one of the card signers delivered their cards to Mandrew personally. He held at least two meetings with the employees and there was no indication that he was inaccessible. These facts clearly distinguish this case from N.L.R.B. v. Georgetown Dress Corporation, 537 F.2d 1239 (4th Cir. 1976), relied on by Respondent. 4 Moreover, it is settled Board law that service as an election observer does not constitute one an agent of a union,5 and this is particularly true where, as here, the Union took no part in Victor's selection which was based, instead, on a consensus of the unit employees. It is also settled that claims of agency status made by an employee who is the purported agent do not establish such a relationship, even though, as here, the unit employees, without checking such claims with the Union, believe them. 6 Contrary to Respondent, I cannot, on this evidence, infer that Special Organizer Mandrew or the Union knew or had reason to know either of Victor's claims of representation or of his conduct described below and failed to repudiate them.

Accordingly, I conclude that Hippolyte Victor was not an agent of the Union or clothed by the Union with apparent authority to the extent that his conduct was attributable to the Union.<sup>7</sup>

#### II. HIPPOLYTE VICTOR'S CONDUCT

Respondent contends, and the General Counsel denies, that even if Victor was not an agent of the Union, he engaged in conduct which created a general atmosphere of fear of reprisal rendering a free choice of representatives impossible.

## A. The Motion for Reconsideration

The following facts were credibly testified to by employee Hermie Joseph: Victor told the employees before the election that, if they did not join the Union, somebody at the Union would get to them, and, if they did not vote for the Union, somebody was going to get hurt. Joseph felt he meant her because Victor was friendly with the other employees but was not friendly with her. Victor also told Joseph, at a gathering of employees in the lunch room, that if she did not vote for the Union, Victor would tell the manager she was a thief, stealing from the Inn (which was not true), and she would lose her job. Joseph was afraid of Victor because he threatened her way of making a living, and so when he told her she had to go to the union office and ask for a union authorization card, she went. On the morning of the election Victor told the employees they had to vote for the Union.

<sup>3</sup> These facts are based on undisputed, mutually corroborative, and not improbable credited testimony of Special Organizer Mandrew, Proprietor Southerland, and employees Wade, Hermie Joseph, and Albert Hughes. I have accepted this testimony by these witnesses without necessarily believing every detail of what each of them said. "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." N.L.R.B. v. Universal Camera Corporation, 179 F.2d 749, 754 (2d Cir. 1950). In making these and other credibility findings, I have taken into consideration that the failure without explanation of the General Counsel and the Union to produce Victor as a witness justifies the inference that his testimony would have been unfavorable to them. Martin Luther King, Sr. Nursing Center, 231 NLRB 15, fn. 1 (1977). I can find no support in the record for Respondent's contentions that the employee gatherings in the Inn lunchroom during the campaign were organizational meetings held by Victor; or, except that it was Victor who notified Hermie Joseph of the December 6 meeting, that he "served as the communications link between the Union and the employees."

<sup>&</sup>lt;sup>4</sup> See The Cambridge Wire Cloth Company, Inc., 256 NLRB 1135 (1981).

<sup>&</sup>lt;sup>5</sup> Ibid.; Tennessee Plastics, Inc., 215 NLRB 315, 319 (1974).

<sup>&</sup>lt;sup>6</sup> Firestone Steel Products Company, A Division of Firestone Tire and Rubber Company, 235 NLRB 548, 550; Bufkor-Pelzner Division, Inc., 169 NLRB 998, 999 (1968).

<sup>&</sup>lt;sup>1</sup> See Zeiglers Refuse Collectors. Inc. v. N.L.R.B., 396 F.2d 1000 (3d Cir. 1981); Abbott Laboratories, Ross Laboratories Division v. N.L.R.B., 540 F.2d 662 (4th Cir. 1976).

I also credit testimony by Catherine Wade confirming that Joseph reported to her that Joseph was physically threatened by Victor; and by proprietor Lon Southerland confirming that Joseph, as well as Lucille Daley, volunteered to him privately, 2 days before the election, in a nervous, apprehensive, and fearful manner, that they really did not see the need for a union.

When confronted with an affidavit she gave on January 22, 1979, to the Board agent investigating the Employer's objection to the election, to the effect that no one threatened her if she voted against the Union, Joseph testified that the affidavit was not true; she credibly explained that she swore to it falsely because Victor told the employees that when a lady came from Puerto Rico they were to tell her Victor had not threatened them and thereby make a liar out of Southerland. She gave the false affidavit, she said:

Because he make us do it. Because he was too tough, so we do what he tell us to do. And what he tell us to say in the statement.

Some months later, Joseph confided in her husband about this matter and he told her Victor could not harm her so, although she was still afraid of Victor, he told Southerland the truth about what had happened, and shortly thereafter on July 27, 1979, executed an affidavit giving an accurate account of events. It was this step which initiated the Employer's motion for reconsideration, which was filed August 10, 1979.

When asked by the General Counsel whether she believed the Union would be good for her, Joseph responded:

Well, nobody did make up their mind to join the Union in fact. But Victor insisted he was going to tell us what and what and what, and we figured we'll go through with it.

There is also evidence of the reasonableness of employee fears that Victor was capable of carrying out his threats. Thus, Catherine Wade, as corroborated by handyman Albert Hughes, credibly testified that Victor had once threatened to beat Wade up with a piece of pipe he kept in the maintenance room, and, Wade added, Victor told her he also had a gun in the trunk of his car and, "So, what he can't take care of with his hands, he'd use the gun"; and she believed him capable of carrying out his threats of physical violence.8

This evidence establishes that maintenance man Hippolyte Victor threatened the employees in the unit with physical violence if they did not join the Union and vote for the Union and threatened one employee with the loss of her job if she did not vote for the Union during the campaign, and followed up with an intimidating statement on the morning of the election. Although employee Joseph felt she was the main brunt of Victor's threats, it is clear that they encompassed the full scope of the small unit. It is also clear that Victor was considered with reason to be capable of violence and that the employees acted in fear of his capability of carrying out his threats.

I therefore find that the election was conducted in an atmosphere of fear of reprisal making it more than likely that the employees cast their votes on the basis of intimidation rather than the conviction characteristic of a free and fair election.<sup>9</sup>

Accordingly, I recommend that the election be set aside on this ground.

## B. The Objection

Handyman Albert Hughes credibly testified that he opposed the union campaign and that he informed Victor he did not believe in unions. As to what Victor said to him, Hughes phrased Victor's statement two different ways, but I am convinced after studying his entire testimony as well as his prehearing affidavit, that the correct version is that Victor told him in effect that if the Union won the election and Hughes did not join the Union within 30 days, he would lose his job. 10 Hughes did not ask Victor what he meant by this but he understood Victor to mean he would have to quit if the Union won the election. Hughes told employee Lucille Daley what Victor said to him, and although he did not recall telling any of the other employees, they informed him that Daley repeated his remark to them.

In his comments to Hughes, Victor said nothing about a union contract with the Employer but, Hughes testified, "if the Union was to win, I had the feeling that there had to be a contract."

Hughes reported Victor's statement to Southerland because he was concerned about the possibility of losing his job. Southerland told Hughes in effect that his job was secure and that neither Victor nor the Union could put him out of his job whether he was a member of the Union or not.<sup>11</sup>

In crediting this testimony I have relied on the favorable demeanor of these witnesses and its mutually corroborative undisputed nature. Although Joseph testified at one point that her first affidavit was true, I attribute this to confusion brought on by vigorous cross-examination. Contrary to the General Counsel, there is no basis for finding that Joseph or any other employee was apprehensive of Southerland. I have considered the evidence that Joseph added her signature under those of Victor and other employees on a letter to the NLRB dated April 20, 1979, protesting the delay in processing the Employer's objections and averring that the employees had voted for the Union "of their own free will," but there is no more basis for finding this act completely voluntary than there is for finding Joseph's visit to the union office, her vote, and her first affidavit completely voluntary. I consider Special Organizer Mandrew's testimony with regard to the letter to be of limited, if any, value, as none of Victor's conduct with which we are here concerned was ever brought to Mandrew's attention

<sup>9</sup> Sonoco of Puerto Rico, Inc., 210 NLRB 493 (1974); Steak House Meat Company. Inc., 206 NLRB 28 (1973); Poinsett Lumber and Manufacturing Company, 116 NLRB 1732 (1956). Accord, Zeiglers Refuse Collections, Inc. v. N.L.R.B., supra. Abbott Laboratories, Ross Laboratories Division v. N.L.R.B., supra, and N.L.R.B. v. Griffith Oldsmobile, Inc., 455 F.2d 867 (8th Cir. 1972), relied on by the General Counsel to support his contention that there was no interference with the election, are distinguishable on this issue in that, unlike the instant case, there was no evidence in those cases that the threats were known throughout the units or that the employees affected were intimidated.
10 Proprietor Southerland testified that Hughes told him Victor said

<sup>10</sup> Proprietor Southerland testified that Hughes told him Victor said Hughes would lose his job within 30 days if he did not vote for the Union. In my opinion this was a misunderstanding by Southerland, as it does not comport with Hughes' affidavit or any of his testimony.

<sup>11</sup> Based on the uncontradicted credited testimony of Hughes. Southerland could not recall his response when told of Victor's remark.

The only reasonable interpretation of Victor's remark which occurs to me is that although not meticulously spelled out, he was referring to the possibility of obtaining a union-security contract if the Union should win the election. In that event, under Section 8(a)(3) of the Act employees could lawfully be required as a condition of employment to join the Union within 30 days of hire or within 30 days of the effective date of the contract whichever was later. Hughes, who was aware that a union victory could be expected to lead to the execution of a collective-bargaining agreement, felt threatened by this possibility because of his opposition to unionism, but it was not a threat that a union advocate such as Victor, or even a union official, was prohibited from making, because the Union could be expected to try its best to persuade the Employer to agree to a union-security contract if it should win the election. If the Union could not obtain Employer agreement to such a contract, of course, then Hughes' fears would turn out to be groundless, and he had Southerland's reassurances on this score.

Accordingly, as the possibility of Hughes' losing his job for refusing to join the Union depended on a union victory in the election and the Employer's agreement to a valid union-security contract, in which case Hughes' job loss would be lawful, and as Southerland's reaction

made even this possibility remote, I cannot find that Victor's remark interfered with a free election, and I recommend that the objection be overruled.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>12</sup>

The complaint in Case 24-CA-4250 is dismissed in its entirety.

It is further ordered that the election held on December 15, 1978, among the Respondent's employees be set aside, that the certification of the Union be revoked, and that Case 24-RC-6207 be severed and remanded to the Regional Director for Region 24 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

<sup>&</sup>lt;sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.